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IN THE
Supreme Court of the United States

October Term, 1947.

No. 664.

ANDREW J. McPARTLAND, INC.,
Petitioner,

vs.

MONTGOMERY WARD & CO., INC.

PETITIONER'S REPLY BRIEF.

EMMET L. HOLBROOK,
Attorney for Petitioner.

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The respondent's opposition to this petition is placed, principally, upon an incomplete conception of our position and the decisions of this Court in *Postum Cereal Co. v. California Fig Nut Co.* (272 U. S. 693), *Pacific Northwest Canning Co. v. Skookum Packers Ass'n* (283 U. S. 858), *Fessenden v. Wilson* (284 U. S. 640), *Chase v. Avery* (307 U. S. 638) and *McBride v. Teeple* (311 U. S. 649).

The jurisdictional basis of our petition is: (1) the judgment of the Court of Customs and Patent Appeals *now is final*; (2) this matter is a "case" within the authoritative interpretations of the constitutional provisions creating this Court and, therefore, this Court has jurisdiction to review by writ of certiorari pursuant to Section 18 of the Trade Mark Act of February 20, 1905 (33 Stat. 729; U. S. C. A. Tit. 15, Sec. 98) and Section 40 of the Trade Mark Act of July 5, 1946 (60 Stat. 440; U. S. C. A. Tit. 15, Sec. 1122).

The first ground is based upon the fact that the amendment to the Patent Law of March 2, 1927 (44 Stat. 1336, Sec. 8; U. S. C. A. Tit. 35, Secs. 59a-63) eliminated the cumulative remedies provided by Secs. 4911-4915 of the Revised Statutes (16 Stat. 204, *et seq.*; U. S. C. A. Tit. 35, Secs. 59, *et seq.*) and excluded any further remedies after appeal to the Court of Customs and Patent Appeals from a decision of the Commissioner of Patents.

The second ground is predicated upon the usurpation by the Commissioner of Patents in 1944 of the judicial function, *not* granted to him by any of the statutes, to hear and determine as between the two parties hereto (a) that the trade-mark "KWIXTART", registered in 1935, is "descriptive" and not entitled to remain registered; (b) that said trade-mark is "descriptive" and that, therefore, petitioner was not entitled to the *exclusive use* of said trade-mark and, therefore, was not entitled to the *use* thereof at the time of applying for registration in 1935; (c) that the petitioner no longer is entitled to the *prima facie* evidence of his right to the *exclusive use* or to the access to the federal courts which the registration granted him in 1935 by the provisions of the Trade Mark Act. This deprivation by the Commissioner of petitioner's property—and a registration is property (*Hanover Star Milling Co. v. Metcalf*, 240 U. S. 357, 60 L. Ed. 713, and cases cited at page 29 of our Main Brief)—is not only an interference with property sufficient to characterize it "judicial action" within the rule of *Atkins v. Moore* (212 U. S. 285, 290) but the deprivation was accomplished without due process of law in violation of petitioner's constitutional rights which also is "judicial action". The usurpation of the judicial function without any natural or statutory authority was in and of itself "judicial action". *Atkins v. Moore*, 212 U. S. 285, 290.

The first distinction to be noted is that the cases cited in opposition to this application all involve opposition or interference proceedings, jurisdiction of which was con-

ferred specifically by statute upon the Commissioner, whatever judicial functions authoritatively exercised by him resulting in authorized administrative action. In our case neither the judicial function nor administrative action is authorized.

The *California Fig Nut Co.* and the *Fessenden* cases both lacked *finality* by reason of the cumulative remedies provided by Sections 4911-4915 of the Revised Statutes and whatever judicial functions were exercised were based upon the specific grant contained in the statute and resulted in administrative action authorized thereby.

The *Fessenden*, *Avery* and *McBride* cases were interference cases. The official report of the first two named merely show that a petition for writ of certiorari was denied without indicating that the disposition was on jurisdictional grounds. The same is true of the *Skookum Packing Co.* case. However, in the *McBride* case the report shows that the petition for writ of certiorari was denied for want of jurisdiction and cites the cases mentioned above. In the *McBride* case it should be noted that the Court of Customs and Patent Appeals modified a decision of the Board of Appeals of the Patent Office, affirming on Counts 2 to 7 inclusive and reversing on Count 1 and remanding the case to the Patent Office for further proceedings as to Count 1.

The Proctor & Gamble Co. cancellation proceedings were based on the lack of "the right to use" a mark, used for the first time in 1921 and registered in 1922, because it was confusingly similar to a mark which had been used and registered in 1913. It was held that the marks were confusingly similar and hence the substantive rule applied that the owner of the 1921 mark did not have "the right to use" it. On the facts, the power to hear and determine and to ~~cancel~~ were conferred by the Act. In our case, even if the mark was "descriptive"—and it is *not*—petitioner *would have* "the right to use it" even though its registration under the Trade-Mark Act would not be permitted and

the power to hear and determine or to cancel was *not* conferred by the Act.

No attempt was made in the *Proctor & Gamble* case to secure a writ of certiorari to have this Court review the decision of the Court of Customs and Patent Appeals which affirmed the Commissioner.

In the equity suit which followed the cancellation case, the Circuit Court of Appeals held that the decisions of the Commissioner and of the Court of Customs and Patent Appeals were *not res adjudicata* with respect to the "issue of cancellation" but that the District Court had no power to direct restoration of the registration. In brief, the decision holds that the decisions in the cancellation proceedings are *not res adjudicata* of the substantive rights existing separate and apart from those conferred by the Trade-Mark Act but that same *are res adjudicata* of the rights as between the parties to the benefits of registration under the Federal Act. This feature constitutes our matter a "case" within the Constitutional provisions.

In the cases relied on by respondent the statute conferred authority to exercise specified judicial or quasi-judicial functions which culminated in authorized administrative acts, elements wholly absent in our case. The absence of such elements render the judicial functions usurped in our case "judicial action" which, together with the finality now attaching to the judgment of the Court of Customs and Patent Appeals, constitutes this, the matter at Bar, a "case" of which this Court has jurisdiction to review.

CONCLUSION.

Wherefore it is respectfully submitted that a writ of certiorari should be granted as prayed for.

Respectfully submitted,

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Attorney for Petitioner.